

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**W.B., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Asheville, NC, Employer**

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**Docket No. 16-0069  
Issued: June 20, 2016**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 13, 2015 appellant filed a timely appeal from an August 5, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 1, 2014, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's requests for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

### **FACTUAL HISTORY**

This is the second appeal before the Board in this case. The facts and circumstances of the case as set forth in the prior decision are incorporated herein by reference. The relevant facts are set forth below.

On March 6, 2014 appellant, then a 32-year-old vending clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 22, 2014 four bottles of frozen soda fell from a vending machine he was working on, causing a crush injury to his right foot. His supervisor controverted the claim, asserting that the vending machine did not freeze the bottles. Also, appellant was involved in an “incident prior where he said product had fallen and video showed this was not the case....” He initially reported the injury after his employment was terminated.

In a March 10, 2014 letter, OWCP advised appellant to submit factual evidence corroborating the January 22, 2014 incident, and medical evidence diagnosing a right foot injury caused by that incident. It afforded him 30 days to submit such evidence. Appellant did not provide additional evidence prior to April 15, 2014.

By decision dated April 15, 2014, OWCP denied the claim as fact of injury was not established. It found that the factual record did not support that the January 22, 2014 incident occurred at the time, place, and in the manner alleged.

Appellant requested reconsideration on May 21, 2014, asserting that he was still under medical treatment. He provided an April 11, 2014 patient intake form and reports from April 28 to June 9, 2014 from a physician assistant. Appellant also submitted a July 7, 2014 report from Dr. Mark R. Hedrick, an attending Board-certified orthopedic surgeon, who related appellant’s account of a “large frozen bottle type object” falling on his right foot on January 22, 2014. Dr. Hedrick noted appellant’s vague pain complaints in the absence of any abnormal findings. He opined that appellant would recover fully 6 to 12 months from the date of injury.

By decision dated August 1, 2014, OWCP denied modification of its prior decision, finding that although Dr. Hedrick established a crush injury of the right foot, his opinion did not overcome the factual inconsistencies in the claim.

Appellant again requested reconsideration on April 19, 2014. He did not submit additional evidence.

By decision dated August 25, 2014, OWCP denied reconsideration as appellant’s April 19, 2014 letter, the only evidence submitted in support of the request, did not contain pertinent and relevant new evidence or raise a substantive legal question. Appellant then appealed to the Board.

By decision and order issued May 26, 2015,<sup>2</sup> the Board affirmed the August 1, 2014 decision denying the traumatic right foot injury, and the August 25, 2014 decision denying reconsideration. The Board found that there was insufficient evidence that the January 22, 2014

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<sup>2</sup> Docket No. 15-0093 (issued May 26, 2015).

incident occurred as alleged. The Board further found that OWCP properly denied reconsideration as appellant did not submit new, relevant evidence or argument in support of his April 19, 2014 request.

In a July 31, 2015 letter, appellant requested reconsideration. He provided employing establishment health unit chart notes by a physician assistant, dated from January 23 to February 20, 2014. The January 23, 2014 note indicated that “about 9:30 yesterday” appellant was loading a soft drink machine when four 20 ounce bottles fell onto his right foot.

By decision dated August 5, 2015, OWCP denied reconsideration, finding that appellant’s July 31, 2015 letter and the accompanying documents did not constitute new, relevant evidence.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>6</sup> Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>7</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant’s application for reconsideration and any evidence submitted in support thereof.<sup>8</sup>

### **ANALYSIS**

Appellant requested reconsideration by a July 31, 2015 letter. In support of his request, he submitted chart notes from a physician assistant providing a narrative of the alleged incident.

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>6</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>7</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>8</sup> *Annette Louise*, 54 ECAB 783 (2003).

The Board finds that OWCP improperly denied reconsideration as appellant submitted pertinent new evidence in support of his claim that OWCP had erred by failing to accept the claimed January 22, 2014 employment incident as factual. On July 31, 2015 OWCP received an employee health record report completed by a physician assistant. The January 23, 2014 note indicated that on the previous day appellant had injured his right foot when four 20-ounce soft drink bottles fell onto his right foot. Additionally, it noted that appellant presented with a foot contusion over the distal 4<sup>th</sup> metatarsal without swelling. This document is new and it is relevant because it provides a contemporaneous history of the claimed injury occurring the day before that is consistent with the history provided by appellant. Moreover, the report listed his job title as a vending clerk. The claimed injury was reportedly from bottles falling from a vending machine which was seemingly within his job duties. Appellant eventually filed his claim for injury several months after the incident and physician assistant report. While the report of a physician assistant is not competent medical evidence,<sup>9</sup> fact of incident is not a medical question requiring a physician's opinion. The Board has held that statements of laypersons may be used to evaluate a claim of incident.<sup>10</sup> In this case, the health record by the physician assistant is new and relevant regarding fact of incident and is sufficient to warrant a merit review. The case will be remanded to OWCP for reconsideration of the merits of the claim, to be followed by issuance of an appropriate merit decision.

On appeal appellant asserts that he was injured on duty and received medical care, but that the employing establishment filed a false statement denying that the January 22, 2014 incident occurred as alleged. As set forth above, the case will be remanded to OWCP for issuance of an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied reconsideration under section 8128(a) of FECA. Appellant submitted pertinent new and, relevant evidence on reconsideration warranting a review of the merits of the claim.

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<sup>9</sup> The Board notes that physician assistants are not physicians under FECA. *See* 5 U.S.C. § 8101(2). *Ricky S. Storms*, 52 ECAB 349 (2001). As these chart notes were not signed or reviewed by a physician, they cannot constitute medical evidence in this case. *See J.S.*, Docket No. 15-1389 (issued October 16, 2015).

<sup>10</sup> *Pearlene Morton*, 52 ECAB 493 (2001). *See Thelma Rogers*, 42 ECAB 866 (1991) (where the Board held that an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence). *See also Connie E. Hollander*, Docket No. 94-2350 (issued July 16, 1996) (where the Board noted that the opinion of a nurse could have probative value in establishing that an employment incident occurred).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 5, 2015 is set aside, and the case remanded for additional development consistent with this decision and order.

Issued: June 20, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board